

No. CR-04-0183

*In the COURT of CRIMINAL APPEALS
Of ALABAMA*

CHARLES SMITH,

Appellant,

v.

STATE OF ALABAMA,

Appellee.

*On Appeal From the Circuit Court of
Montgomery County
(CC-02-920.60)*

BRIEF OF APPELLEE

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January 19, 2005

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EXHIBIT H

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

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STATEMENT OF THE CASE AND FACTS

This is a Rule 32 appeal by Charles Smith (Smith) from the denial of his Rule 32 petition in the Circuit Court of Montgomery County, Alabama. Judge Truman Hobbs presided.

Smith was convicted of first degree robbery by a jury on October 29, 2002, and he was sentenced to twenty years in the penitentiary. (C. 5, 70) He appealed to this Court, and on May 23, 2003, Smith's conviction was affirmed by memorandum. (C. 70-74) The certificate of judgment of affirmance was issued on June 10, 2003. This Court is requested to take judicial notice of its own records in Smith's direct appeal, Smith v. State, CR-02-0327.

Smith filed his instant Rule 32 petition in the Montgomery County Circuit Court on or about January 27, 2004.¹ (C. 5-51) The State's Response and Motion to Dismiss was filed on August 12, 2004. (C. 63-77) No evidentiary hearing was held in the matter, and the trial court summarily denied the Rule 32 petition on October 5,

¹ The petition was signed on January 27, 2004, but the clerk's stamp of filing was dated April 8, 2004. (C. 5, 12)

2004. (C. 78-81) Timely notice of appeal was filed on
October 13, 2004. (C. 82)

STATEMENT OF THE ISSUE

Did the Rule 32 court exercise sound discretion in denying Smith's Rule 32 petition without an evidentiary hearing?

STATEMENT OF THE STANDARD OF REVIEW

This Court held in Reed v. State, 748 So. 2d 231, 233 (Ala. Crim. App. 1999), concerning the standard of review for a Rule 32 appeal, as follows:

We apply an abuse of discretion standard of review to the circuit court's denial of a Rule 32, A.R.Crim.P., petition for postconviction relief. See *Elliott v. State*, 601 So.2d 1118 (Ala.Cr.App. 1992). If the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition. See *Roberts v. State*, 516 So.2d 936 (Ala.Cr.App. 1987).

SUMMARY OF THE ARGUMENT

The trial court's denial of Smith's Rule 32 petition is due to be affirmed. The trial court's order denying the Rule 32 petition is supported by the record and the controlling law. Smith's instant issues were properly dismissed and denied, because they were procedurally barred or meritless.

ARGUMENT

The Rule 32 Court Exercised Sound Discretion In Denying Smith's Rule 32 Petition Without An Evidentiary Hearing.

Smith's Rule 32 petition alleged seven issues that he argues amounted to reversible errors. (C.27-48) The issues raised by Smith were enumerated in the State's Motion to Dismiss, as follows:

1. The Trial Court erred by denying the Petitioner's two oral motions seeking a judgment of acquittal during trial;
2. The Trial Court erred in denying the Petitioner's motion for new counsel and for a continuance thus depriving him of effective assistance of trial counsel;
3. The Trial Court erred by ruling the Petitioner's Due Process rights were not violated by the Montgomery Police Department's

inadvertent loss of the videotape shot from the police vehicle that chased the Petitioner on the night the offense in question was committed;

4. The Trial Court erred by sentencing the defendant to a 20-year term of imprisonment without stating the reasons therefore;
5. The Trial Court erred in sentencing the defendant under the Habitual Felony Offender Act, Section 13A-5-9 (HFOA);
6. The Trial Court had no jurisdiction to impose sentence due to a faulty arrest warrant and indictment; and
7. The indictment was fatally flawed on its face, thus depriving the court of jurisdiction to render judgment and impose sentence.

(C. 64-67) In his brief in this appeal, Smith raises those same issues. The trial court exercised sound discretion in denying those issues below, and the trial court's judgment is due to be affirmed.

Rule 32.3, A.R.Crim.P., states in part as follows:

The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.

Rule 32.6(b), A.R.Crim.P., requires the petition "...contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual

basis of those grounds." Rule 32.7(d), A.R.Crim.P., reads as follows:

(d) SUMMARY DISPOSITION. If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing.

Issues raised or addressed on appeal are precluded. Rule 32.2(a)(4), A.R.Crim.P.. Furthermore, issues that could have been raised at trial and on direct appeal, but were not so raised, are precluded. Rule 32.2(a)(3) and (5), A.R.Crim.P..

The trial court addressed each of Smith's seven issues in its order of summary dismissal and held that issues 1, 2, and 3 were precluded by Rule 32.2(a)(4), A.R.Crim.P., because they had been raised and addressed on direct appeal. (C. 79) The record supports that procedural bar. Issues 4 and 5 were properly denied by the trial court, because the minimum sentence for Smith's Class A felony conviction was twenty years with the weapons enhancement.

There was no real contention by Smith, as to the applicability of the weapons enhancement. These issues failed to state a claim. (C. 79, 80) Smith's sixth claim that his arrest warrant was improper was a non-jurisdictional issue and should have been raised at trial and on direct appeal, but was not so raised. The trial court properly held this issue was precluded under Rule 32.2(a)(3) and (5), A.R.Crim.P.. (C. 80) The seventh issue, that the indictment was fatally flawed because it named the wrong victim, lacked merit, and the trial court correctly held such to be the case. (C. 80, 81) The issue failed to raise a disputed issue of material fact. The trial court's judgment is supported by the record (both Rule 32 and direct appeal records), and should be affirmed.

Smith argues in brief that he raised additional claims of ineffective assistance of trial and appellate counsel in his Rule 32 petition. (See Smith's brief 1-5) The record reflects, however, that Smith did not raise these issues in his Rule 32 petition, other than by checking that ground in the Rule 32 form petition. (C. 5-51) Smith did allude to such issues in his opposition to the State's motion for summary dismissal. (Supp. C. 4-8) The record does not

reflect a request by Smith to amend his Rule 32 petition to add claims of ineffective assistance of counsel. These issues, therefore, are being raised for the first time on appeal and are not reviewable. Whitehead v. State, 593 So. 2d 126, 130 (Ala. Crim. App. 1991).

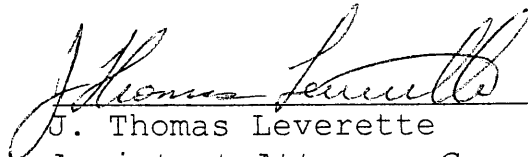
In the event this Court determines the ineffective assistance of counsel claims are not procedurally barred from appellate review, they failed to state a claim, because Smith failed to plead prejudice. See Fortenberry v. State, 659 So. 2d 194, 197 (Ala. Crim. App. 1994). His claims are nothing more than bare allegations unsupported in fact. (Supp. C. 6-8) Such allegations are barred by Rules 32.3 and 32.6(b), A.R.Crim.P..

CONCLUSION

The trial court's summary dismissal of Smith's Rule 32 petition is due to be affirmed.

Respectfully submitted,

Troy King
Attorney General

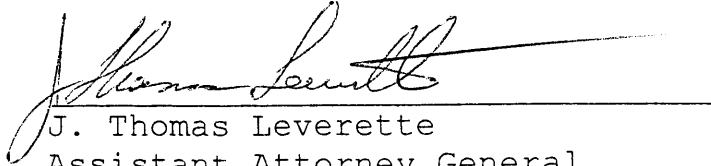


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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2005, I served a copy of the foregoing brief on Smith, by placing the same in the United States Mail, first class, postage prepaid and addressed as follows:

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